

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

TRACI C. YATES,)	
)	No. CV-08-0058-CI
Plaintiff,)	
)	ORDER GRANTING PLAINTIFF'S
v.)	MOTION FOR SUMMARY JUDGMENT
)	AND REMANDING FOR
MICHAEL J. ASTRUE,)	ADDITIONAL PROCEEDINGS
Commissioner of Social)	PURSUANT TO SENTENCE
Security,)	FOUR 42 U.S.C. § 405(g)
)	
Defendant.)	

BEFORE THE COURT are cross-Motions for Summary Judgment. (Ct. Rec. 22, 24.) Attorney Maureen J. Rosette represents Plaintiff; Special Assistant United States Attorney Leisa A. Wolf represents Defendant. The parties have consented to proceed before a magistrate judge. (Ct. Rec. 8.) After reviewing the administrative record and the briefs filed by the parties, the court **GRANTS** Plaintiff's Motion for Summary Judgment and remands the matter to the Commissioner for additional proceedings pursuant to sentence four of 42 U.S.C. § 405(g).

Plaintiff applied for disability income benefits (DIB) and Supplemental Security Income (SSI) on December 23, 2003. (Tr. 5, 90-93.) She alleges disability due to borderline personality disorder, dysthymia, back pain and wrist injury. (Tr. 103.) She initially alleged an onset date of March 19, 2001. (Tr. 112.) Following a denial of benefits at the initial stage and on reconsideration, a hearing was held before Administrative Law Judge

(ALJ) R. J. Payne on April 19, 2006. (Tr. 609-27.) At this hearing, Plaintiff's alleged onset date was amended to June 1, 2003. (Tr. 613.) Plaintiff appeared but did not testify; medical expert Ronald Klein, Ph.D., testified. (Tr. 613-27.) The ALJ determined additional evidence was needed, and a supplemental hearing was held on September 7, 2006, at which Dr. Klein and Arthur Craig, M.D., testified. (Tr. 630.) Plaintiff did not appear at this hearing for "good cause" shown. (Tr. 632, 654.) A third hearing was held on January 24, 2007, at which Plaintiff and vocational expert Tom Moreland testified. (Tr. 652-702.) Plaintiff was represented by counsel at all three hearings. On February 10, 2007, ALJ Payne denied benefits; review was denied by the Appeals Council. (Tr. 7-10, 20-30.) This appeal followed. Jurisdiction is appropriate pursuant to 42 U.S.C. § 405(g).

STANDARD OF REVIEW

In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the court set out the standard of review:

The decision of the Commissioner may be reversed only if it is not supported by substantial evidence or if it is based on legal error. *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put another way, substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational interpretation, the court may not substitute its judgment for that of the Commissioner. *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of Social Sec. Admin.* 169 F.3d 595, 599 (9th Cir. 1999).

The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed

1 *de novo*, although deference is owed to a reasonable
 2 construction of the applicable statutes. *McNatt v. Apfel*,
 201 F.3d 1084, 1087 (9th Cir. 2000).

3 SEQUENTIAL PROCESS

4 Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the
 5 requirements necessary to establish disability:

6 Under the Social Security Act, individuals who are
 7 "under a disability" are eligible to receive benefits. 42
 8 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any
 9 medically determinable physical or mental impairment"
 10 which prevents one from engaging "in any substantial
 11 gainful activity" and is expected to result in death or
 12 last "for a continuous period of not less than 12 months."
 13 42 U.S.C. § 423(d)(1)(A). Such an impairment must result
 14 from "anatomical, physiological, or psychological
 15 abnormalities which are demonstrable by medically
 16 acceptable clinical and laboratory diagnostic techniques."
 42 U.S.C. § 423(d)(3). The Act also provides that a
 claimant will be eligible for benefits only if his
 impairments "are of such severity that he is not only
 unable to do his previous work but cannot, considering his
 age, education and work experience, engage in any other
 kind of substantial gainful work which exists in the
 national economy" 42 U.S.C. § 423(d)(2)(A). Thus,
 the definition of disability consists of both medical and
 vocational components.

17 In evaluating whether a claimant suffers from a
 18 disability, an ALJ must apply a five-step sequential
 19 inquiry addressing both components of the definition,
 20 until a question is answered affirmatively or negatively
 21 in such a way that an ultimate determination can be made.
 22 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The
 claimant bears the burden of proving that [s]he is
 disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.
 1999). This requires the presentation of "complete and
 detailed objective medical reports of h[is] condition from
 licensed medical professionals." *Id.* (citing 20 C.F.R. §§
 404.1512(a)-(b), 404.1513(d)).

23 STATEMENT OF FACTS

24 The facts of the case are set forth in detail in the transcript
 25 of proceedings, and are briefly summarized here. Plaintiff was 43
 26 years old at the time of the last administrative hearing. (Tr. 656.)
 27 She completed her high school equivalency degree and had attended
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1 vocational school. She was separated from her spouse, and lived
2 alone in an apartment. (Tr. 658.) Plaintiff had past work
3 experience as a food server and housekeeper. (Tr. 661-62.) She
4 testified she had received disability benefits in the past, but the
5 benefits were terminated in 2000, for failure to attend a review
6 hearing. (Tr. 667.) She has a history of drug abuse and criminal
7 activity, including incarcerations. She testified she had not used
8 drugs since September 2002. (Tr. 694.) Plaintiff stated she was
9 unable to work due to back pain, colitis and mental disorders. (Tr.
10 667.) At the hearing, Plaintiff testified she needed to elevate her
11 feet due to leg swelling. (Tr. 681.) She testified she could sit
12 for one to two hours, at most, or a minimum of five to ten minutes;
13 could stand 15 minutes to a half hour; could walk two blocks, climb
14 a flight or two of stairs; and could lift five to ten pounds. (Tr.
15 683-87.) She had a valid driver's license and drove her
16 grandmother's car. She indicated she used a motorized scooter, when
17 going more than two blocks, and used a cane everyday. (Tr. 684-85.)
18 She also testified she suffered from depression and anxiety and did
19 not do well around people. (Tr. 691.)

20 ADMINISTRATIVE DECISION

21 The ALJ determined Plaintiff's date of last insured was June
22 30, 2003. (Tr. 20.) At step one of the sequential evaluation, the
23 ALJ found Plaintiff had not engaged in substantial gainful activity
24 since 1994. (Tr. 22.) At step two, he found Plaintiff had the
25 severe impairments of "complaints of back pain with no significant
26 clinical or objective findings, mild to moderate sleep apnea
27 (improved with CPAP treatments), right wrist reconstruction surgery
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1 with residual flexion/extension limitations, a history of breast
2 cancer, and a history of anxiety and dysthymia." (Tr. 23.) After
3 a discussion of the medical evidence, the ALJ found Plaintiff did
4 not have "an impairment or combination of impairments that meets or
5 medically equals one of the listed impairments in 20 C.F.R. Part
6 404, Subpart P, Appendix 1" (Listings). (Tr. 26.) The ALJ found
7 Plaintiff's statements regarding the severity of her impairments and
8 symptoms were not credible. (Tr. 27.) At step four, he determined
9 she had the residual functional capacity (RFC) to perform sedentary
10 work with non-exertional physical limitations, and therefore, could
11 not perform past relevant work. (Tr. 26-28.) At step five,
12 considering vocational expert testimony, he found Plaintiff could
13 perform other jobs in the national economy and concluded she was not
14 disabled as defined by the Social Security Act. (Tr. 29.)

15 **ISSUES**

16 The question presented is whether there was substantial
17 evidence to support the ALJ's decision denying benefits and, if so,
18 whether that decision was based on proper legal standards.
19 Plaintiff contends the ALJ erred when he (1) improperly rejected
20 examining physician opinions regarding the diagnoses and severity of
21 her mental impairments at step two; (2) did not properly assess the
22 severity of her impairments in assessing her ability to work at
23 steps four and five; and (3) improperly relied on medical expert
24 testimony. (Ct. Rec. 23 at 13-19.)

25 **DISCUSSION**

26 **A. Medically Determinable Impairments**

27 To satisfy step two's requirement of a severe impairment, the
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1 claimant must prove the existence of a physical or mental impairment
2 by providing medical evidence consisting of signs, symptoms, and
3 laboratory findings; the claimant's own statement of symptoms alone
4 will not suffice. 20 C.F.R. §§ 404.1508, 416.908. The effects of
5 all symptoms must be evaluated on the basis of a medically
6 determinable impairment which can be shown to be the cause of the
7 symptoms. 20 C.F.R. §§ 404.1529, 416.929. Once medical evidence
8 of an underlying impairment has been shown, medical findings are not
9 required to support the alleged severity of pain or symptoms.
10 *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th Cir. 1991). However, an
11 overly stringent application of the severity requirement violates
12 the statute by denying benefits to claimants who do meet the
13 statutory definition of disabled. *Corrao v. Shalala*, 20 F.3d 943,
14 949 (9th Cir. 1994). Thus, the Commissioner has passed regulations
15 which guide evaluation of the evidence at step two. Those
16 regulations state an impairment may be found to be "non-severe" only
17 when evidence establishes a "slight abnormality" that has "no more
18 than a *minimal effect* on an individual's ability to work." *Id.*
19 (*citing Social Security Ruling (SSR) 85-28*).

20 Further, the ALJ must consider the combined effect of a
21 claimant's impairments, severe and non-severe, on the ability to
22 function, without regard to whether each alone is sufficiently
23 severe. See 42 U.S.C. § 423(d)(2)(B)(Supp. III 1991). Therefore,
24 it is necessary for the Commissioner to identify non-severe
25 impairments supported by the evidence, as well as severe
26 impairments. It is noted on independent review that the ALJ failed
27 to make findings regarding Plaintiff's medically determinable non-

1 severe impairments. (Tr. 23-26.) The combined effect of all
2 medically determinable physical and mental impairments should be
3 considered at step three and four. 20 C.F.R. §§ 404.1526(a)(c),
4 416.926(a)(c); 404.1545(a)(2), 416.945(a)(2). The failure to do so
5 is legal error requiring remand. *Lester v. Chater*, 81 F.3d 821, 830
6 (9th Cir. 1995).

7 **B. Severe Impairments**

8 The step two inquiry is a *de minimis* screening device to
9 dispose of groundless or frivolous claims. *Bowen v. Yuckert*, 482
10 U.S. 137, 153-154 (1987). The adjudicator's role at step two is
11 explained by SSR 85-28:

12 A determination that an impairment(s) is not severe
13 requires a careful evaluation of the medical findings
14 which describe the impairment(s) and an informed judgment
15 about its (their) limiting effects on the individual's
16 physical and mental ability(ies) to perform basic work
17 activities; thus, an assessment of function is inherent in
the medical evaluation process itself. At the second step
of sequential evaluation, then, medical evidence alone is
evaluated in order to assess the effects of the
impairment(s) on ability to do basic work activities.

18 SSR 85-28. The regulations advise the adjudicator that "[g]reat
19 care should be exercised in applying the not severe impairment
20 concept." *Id.*

21 In determining whether a claimant has a severe impairment the
22 ALJ must evaluate the medical evidence submitted and explain the
23 weight given to the opinions of accepted medical sources in the
24 record. The regulations distinguish among the opinions of three
25 types of accepted medical sources: (1) sources who have treated the
26 claimant; (2) sources who have examined the claimant; and (3)
27 sources who have neither examined nor treated the claimant, but
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1 express their opinion based upon a review of the claimant's medical
2 records. 20 C.F.R. §§ 404.1527, 416.927. A treating physician's
3 opinion carries more weight than an examining physician's, and an
4 examining physician's opinion carries more weight than a non-
5 examining reviewing or consulting physician's opinion. *Benecke v.*
6 *Barnhart*, 379 F.3d 587, 592 (9th Cir. 2004); *Lester*, 81 F.3d at
7 830. "As is the case with the opinion of a treating physician, the
8 Commissioner must provide 'clear and convincing' reasons for
9 rejecting the uncontradicted opinion of an examining physician."
10 *Lester*, 81 F.3d at 830 (citation omitted). If the opinion is
11 contradicted, it can only be rejected for specific and legitimate
12 reasons that are supported by substantial evidence in the record.
13 *Andrews*, 53 F.3d at 1043. The testimony of a non-examining medical
14 expert by itself cannot be considered substantial evidence that
15 supports the rejection of an examining physician. *Lester*, 81 F.3d
16 at 831.

17 In addition to medical source opinions, the ALJ is required to
18 consider "other source" opinions. Under the Regulations, "other
19 sources" include nurse practitioners, physicians' assistants, mental
20 health therapists, teachers, social workers, spouses and other non-
21 medical sources. 20 C.F.R. §§ 404.1513(d), 416.913(d). "Other
22 source" testimony can never establish a diagnosis or disability
23 absent corroborating competent medical evidence. *Nguyen v. Chater*,
24 100 F.3d 1462, 1467 (9th Cir. 1996). More weight is given to the
25 opinion of a non-examining medical source than that of a non-medical
26 source. 20 C.F.R. §§ 404.1527, 416.927; *Gomez v. Chater*, 74 F.3d
27 967, 970-71 (9th Cir. 1996). However, the ALJ is required to

1 "consider observations by non-medical sources as to how an
2 impairment affects a claimant's ability to work." *Sprague v. Bowen*,
3 812 F.2d 1226, 1232 (9th Cir. 1987). An ALJ is obligated to give
4 reasons germane to "other source" testimony before dismissing or
5 discounting it. *Dodrill v. Shalala*, 12 F.3d 915, 919 (9th Cir.
6 1993).

7 Here, Plaintiff submitted psychological evaluations from
8 examining psychologists Deborah Brown, Ph.D.; Kayleen Islam-Zwart,
9 Ph.D.; Dennis Pollack, Ph.D., and James Bailey, Ph.D. She also
10 submitted medical treatment notes, which included observations from
11 her mental health therapists and physician's assistants. In January
12 2004, Dr. Brown administered a mini-mental status exam (within
13 normal limits, reliable results), Trails A and B (within normal
14 limits), and the Personality Assessment Index (PAI)(possibility of
15 exaggeration of complaints, but results interpretable). (Tr. 221.)
16 Dr. Brown found the results supported a diagnosis of Dysthymic
17 Disorder, but not a full diagnosis of borderline personality
18 disorder. (Tr. 222.) She also found Plaintiff's complaints were
19 consistent with testing results. (*Id.*) She assessed several
20 "marked" limitations in cognitive and social function, with an
21 expected duration of six months. (Tr. 225-26.)

22 Plaintiff was diagnosed with carcinoma *in situ* (right breast)
23 in mid-2004, and underwent several surgeries, chemotherapy and
24 radiation treatments from October 2004 through September 2005. (Tr.
25 384-404.) In April 2004, Plaintiff was receiving mental health
26 treatment at Spokane Mental Health Center and Family Service
27 Spokane. (Tr. 407-64, 476-500.) Her therapists consistently noted

1 symptoms of fatigue, depression and post-traumatic symptoms. (See
2 e.g., Tr. 431, 441-43, 447-48, 487, 490, 492, 496.) In April 2005,
3 Dr. Islam-Zwart, supervised by Dr. Brown, re-evaluated Plaintiff's
4 mental state. (Tr. 277-280.) In addition to a mental status exam,
5 the following objective tests were administered: Trails A and B
6 (mildly impaired); Fifteen Item Memory test (no indication of memory
7 malingering); and the PAI (interpretable, but indicating
8 exaggeration of problems). (Tr. 279.) The examining psychologist
9 observed symptoms of depression and anxiety that would interfere
10 with work activities, and made formal diagnoses of PTSD,
11 undifferentiated somatoform disorder and personality disorder (NOS).
12 (Tr. 279.) It was also noted Plaintiff had been in mental health
13 treatment, including medication, for over one year. (*Id.*)

14 In April 2006, Dr. Pollack evaluated Plaintiff, based on a
15 review of the records, a mental status exam, and results of the
16 following objective tests: Wechsler Adult Intelligence Scale
17 (WAIS)(low average range of intelligence); Minnesota Multiphasic
18 Personality Inventory II (MMPI-2) (attempt to present self in a
19 "most unfavorable light" with scores suggesting serious
20 psychopathology and "perhaps of a Bipolar nature"); Test of Memory
21 Malingering (TOMM) (good effort, not malingering); Millon Clinical
22 Multixial Inventory III (MCMI-III) (highly unusual results but
23 considered valid). (Tr. 465-470.) Dr. Pollack commented that the
24 scores on her personality testing were "so elevated as to make an
25 interpretation of the scores very difficult." (Tr. 471.)
26 Nonetheless, based on these scores and similar scores obtained in
27 additional testing, he diagnosed major depressive disorder

1 (chronic), polysubstance dependence in remission, PTSD, panic
2 disorder with agoraphobia, and personality disorder with antisocial
3 and borderline features. (Tr. 471.) He opined Plaintiff's scores
4 indicated she was not malingering. (*Id.*) In a Mental Medical
5 Source Statement completed with the evaluation, Dr. Pollack found
6 "marked" limitations in Plaintiff's ability to perform activities
7 within a schedule and maintain regular attendance, and in her
8 ability to complete a normal workday and perform at a consistent
9 pace. (Tr. 473.) The ALJ rejected these opinions. (Tr. 24.)

10 At the April 19, 2006, hearing, medical expert Ronald Klein,
11 Ph.D., testified there was no documentation of "inability to perform
12 normal tasks" prior to December 2004. (Tr. 620.) Noting unusual
13 scores and elevated scores that suggested exaggeration of symptoms,
14 Dr. Klein opined the results from psychological testing by Dr.
15 Pollack were not valid. (Tr. 622.) He also considered use of Dr.
16 Pollack's Global Assessment of Functioning (GAF) score of 35
17 unreliable, as it reflected an individual "who's virtually in a
18 hallucinatory state, a psychotic." (Tr. 623.) He testified the GAF
19 system is subjective and was not designed for use in disability
20 hearings. (Tr. 624.) Dr. Klein found evidence of depressive
21 disorder and personality disorder in the area of unstable
22 interpersonal relationships and impulsive and damaging behavior,
23 causing no more than mild limitations. (Tr. 556, 617-18.)

24 After the first hearing, the ALJ ordered a new psychological
25 evaluation with testing. (Tr. 627.) Dr. James Bailey evaluated
26 Plaintiff on May 11, 2006, based on a review of the records,
27 interview and mental status exam, Weschler Memory Scale (WMS-

1 III)(congruent with prior IQ testing, visual memory within normal
2 range, and auditory memory in the borderline range); and Miller
3 Forensic Assessment of Symptoms Test (M-FAST) (positive for
4 malingering). (Tr. 525.) He noted Plaintiff tended to exaggerate
5 symptoms, consistent with MMPI-2 scales reported by Dr. Pollack.
6 (*Id.*) Dr. Bailey diagnosed Personality Disorder with borderline
7 antisocial factors, noting "a very strong disability conviction."
8 (Tr. 526.)

9 At the second hearing, Dr. Klein reviewed the results from Dr.
10 Bailey's evaluation and discussed evidence of a depressive disorder.
11 (Tr. 639.) He found no mental impairments that met the Listings,
12 noting that M-FAST results showed "malingering on the psychiatric
13 symptomatology," thus further diminishing Plaintiff's credibility.
14 (Tr. 639, 640.) In addition, Dr. Klein observed Plaintiff reported
15 information to Dr. Bailey that was not referenced elsewhere in the
16 record, most notably a report she was shot in the back in 2002. (Tr.
17 522, 642.) In his April 2006 and September 2006 Psychiatric Review
18 Technique forms, Dr. Klein opined Plaintiff had no severe
19 impairments. (Tr. 546, 556.)

20 At step two, the ALJ found Plaintiff had the severe impairments
21 of "a history of anxiety and dysthymia," but gave no explanation as
22 to the basis for this finding, or to weight given or reasons for
23 rejecting Dr. Brown's diagnoses (based on objective medical
24 evidence) of PTSD, undifferentiated somatoform disorder and
25 personality disorder (NOS) made in April 2005. Further he did not
26 give specific and legitimate reasons for rejecting her findings of
27 "marked" limitations in cognitive and social functioning. Although
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1 the ALJ mentioned Dr. Bailey's "primary diagnosis of personality
2 disorder," he did not adopt that diagnosis as an impairment, severe
3 or non-severe, failed to explain what weight was given to Dr.
4 Bailey's opinions regarding Plaintiff's limitations, and did not
5 specifically reject the diagnosis or limitations.¹ (Tr. 24.)
6 Failure to properly reject examining physicians' opinions is
7 reversible error. *Andrews*, 53 F.3d at 1043.

8 Although the ALJ briefly summarized Dr. Klein's medical expert
9 opinions (Tr. 26), he did not explain what, if any, weight was given
10 to that testimony and what other evidence in the record supported
11 Dr. Klein's conclusions. (Tr. 26.) This also appears to be the
12 case with Dr. Craig's testimony regarding Plaintiff's physical
13 limitations. (Tr. 28.) Without support from other evidence in the
14 record, reliance on medical expert testimony is legal error.
15 *Lester*, 81 F.3d at 831.

16 For step two purposes, Plaintiff met her burden of providing
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18 ¹ It is also noted on independent review that unrejected
19 limitations assessed by Dr. Brown and Dr. Bailey were neither
20 included in the ALJ's hypothetical to the vocational expert at the
21 hearing nor in the ALJ's final step four or five findings.
22 Vocational expert testimony has no evidentiary value if the
23 hypothetical question posed does not include all unrejected
24 limitations and restrictions supported by the record. *Magallanes v.*
25 *Bowen*, 881 F.2d 747, 756 (9th Cir. 1989) (*citing Embrey v. Bowen*, 849
26 F.2d 418, 422 (9th Cir. 1988)).

1 objective medical evidence consisting of signs, symptoms, and
 2 laboratory findings of mental disorders, as well as medical records
 3 documenting ongoing treatment with medication. 20 C.F.R. §§
 4 404.1526, 416.926; *Webb v Barnhart*, 433 F.3d 683, 687 (9th Cir.
 5 2005). Further, Plaintiff's subjective complaints are consistent
 6 with diagnosis of depression and personality disorder.² The evidence
 7 presented establishes more than "slight abnormality" in Plaintiff's
 8 mental condition due to depression, post-traumatic stress syndrome,
 9 and personality disorder. The ALJ's step two findings are based on
 10 legal error.

11 **C. Obesity**

12 On independent review, it is noted that medical sources have
 13 reported negative effects of Plaintiff's obesity on her various
 14 medical conditions and treatment. (See e.g. Tr. 300, 519-20, 536-
 15 37, 544, 634.) While obesity has been eliminated as a Listing, it
 16 can constitute the equivalence of a Listing. SSR 02-01p. The
 17 current prefaces to the musculoskeletal, respiratory and
 18 cardiovascular body system Listings provide guidance about the
 19 potential effects obesity has in causing or contributing to

21 ² Although the ALJ's credibility findings have not been
 22 challenged, the ALJ failed to specify which of her subjective
 23 complaints he found not credible. (Tr. 27.) The court is unable to
 24 review what, if any, symptoms have been rejected. On remand, the
 25 ALJ shall identify allegations deemed unreliable and give "clear and
 26 convincing" reasons for rejecting them. *Thomas v. Barnhart*, 278
 27 F.3d 947, 958-959 (9th Cir. 2002); *Bunnell*, 947 F.2d at 345-46.

1 impairments in those body systems. See, e.g., 20 C.F.R. Part 404,
2 Subpt. P, App. 1, Section 1.00Q. In addition, according to the
3 Commissioner, "obesity may cause or contribute to mental impairments
4 such as depression." SSR 02-01p. The Ruling recognizes that
5 obesity will constitute a severe impairment when "it significantly
6 limits an individual's physical or mental ability to do basic work
7 activities." SSR 02-01p. A failure to consider obesity where the
8 record is clear that obesity exacerbates a claimant's reported
9 illnesses is reversible error. *Burch v. Barnhart*, 400 F.3d 676,
10 681-82 (9th Cir. 2005); *Celaya v. Halter*, 332 F.3d 1177, 1181-82 (9th
11 Cir. 2003). Here, the ALJ failed to factor in Plaintiff's
12 documented obesity in combination with her physical and mental
13 impairments at step two. Further, he did not consider the effect
14 obesity has upon Plaintiff's ability to perform routine movement and
15 necessary physical activity within the work environment at step
16 four. SSR 02-01p. The ALJ's failure to consider Plaintiff's
17 obesity in his sequential evaluation is reversible error.

18 **D. Remedy**

19 There are two remedies where there has been a failure to
20 provide adequate reasons for rejecting the opinions of a treating or
21 examining psychologist. The general rule, found in the *Lester* line
22 of cases, is to "credit that opinion as a matter of law." *Lester*,
23 81 F.3d at 834; *Pitzer v. Sullivan*, 908 F.2d 502, 506 (9th Cir.
24 1990); *Hammock v. Bowen*, 879 F.2d 498, 502 (9th Cir. 1989). Under
25 the alternate approach found in *McAllister v. Sullivan*, 888 F.2d 599
26 (9th Cir. 1989), a court may remand to allow the ALJ to provide the
27 requisite specific and legitimate reasons for disregarding the

1 opinion. See also *Salvador v. Sullivan*, 917 F.2d 13, 15 (9th Cir.
2 1990)(citing *McAllister*). Remand for immediate benefits is
3 appropriate only when it is clear from the record that Plaintiff is
4 disabled. *Benecke*, 379 F.3d at 593; *Harman v. Apfel*, 211 F.3d 1172,
5 1178 (9th Cir. 2000). Where evidence has been identified that may be
6 a basis for a finding, but the findings are not articulated, remand
7 for additional proceedings is the proper disposition. See *Gonzalez*
8 *v. Sullivan*, 914 F.2d 1197, 1202 (9th Cir. 1990).

9 Here, remand is necessary for proper evaluation of opinions
10 from acceptable medical sources, and other sources who have observed
11 Plaintiff's symptoms, and new step two findings. However, Plaintiff
12 may not succeed in proving she is "disabled" (as defined by the
13 Social Security Act) at step two, because a step two determination
14 that an impairment is severe "only raises a *prima facie* case of a
15 disability." *Hoopai v. Astrue*, 499 F.3d 1071, 1076 (9th Cir. 2007)
16 (citing *Tackett*, 180 F.3d at 1100). The ALJ is required to consider
17 all impairments, severe and non-severe, in combination in assessing
18 Plaintiff's ability to perform work activities at steps four and
19 five. On remand, additional medical evidence may be submitted. The
20 ALJ shall conduct a new hearing with vocational expert testimony,
21 conduct a new sequential evaluation, and render a new decision which
22 will include, but is not limited to, an explanation of weight given
23 to the opinions of all acceptable medical sources and other sources
24 and new credibility findings. Accordingly,

25 **IT IS ORDERED:**

26 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 22**) is
27 **GRANTED**. The matter is remanded to the Commissioner for additional
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1 proceedings pursuant to 42 § U.S.C. § 405(g) and consistent with the
2 decision above.

3 2. Defendant's Motion for Summary Judgment dismissal (**Ct.**
4 **Rec. 24**) is **DENIED**.

5 3. Application for attorney fees may be made by separate
6 motion.

7 The District Court Executive is directed to file this Order and
8 provide a copy to counsel for Plaintiff and Defendant. The file
9 shall be **CLOSED** and judgment entered for **Plaintiff**.

10 DATED March 10, 2009.

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12 S/ CYNTHIA IMBROGNO
13 UNITED STATES MAGISTRATE JUDGE
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